IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0135
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
CRAIG ALLEN BAY,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20050565

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED IN PART AND REMANDED IN PART

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E S P I N O S A, Judge.

¶1 Genetic testing performed in 2004 linked appellant Craig Allen Bay to crimes he had committed seventeen years earlier, in September 1987. Bay was indicted in February

2005 on two counts of sexual assault and one count each of kidnapping and aggravated assault with a deadly weapon. A jury found him guilty of all four charges and also found the kidnapping and aggravated assault counts were dangerous offenses. Bay waived a jury trial on the state's allegation that he had prior convictions, and the trial court found he had three prior felony convictions. It sentenced him in April 2006 to consecutive, aggravated, twenty-one year prison terms on the two sexual assault counts. It imposed aggravated terms of twenty-one and fifteen years for Bay's kidnapping and aggravated assault convictions and ordered those to be served concurrently with the other two sentences.

¶2 On appeal, Bay complains he should have had a jury trial on any prior conviction used to enhance his sentences. Although he acknowledges having expressly waived his right under *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536 (2004), to a jury trial on any aggravating factors, he seeks to distinguish, and to exempt from his waiver, the use of his prior convictions to enhance his sentences.[1] Because Bay did not present this claim to the trial court or object on this ground below, "he has forfeited any right to appellate relief absent fundamental, prejudicial error." *State v. Robles*, 213 Ariz. 268, ¶ 12, 141 P.3d 748, 752 (App. 2006). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense,

[1]It is clear from the record that the trial court and both counsel contemplated that a prior conviction, once found by the court to exist, could potentially be used either for aggravation or enhancement, but the court did not articulate that shared assumption nor differentiate between the two uses when it addressed Bay individually.

and error of such magnitude that the defendant could not possibly have received a fair trial.'" *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984).

¶3 When Bay committed his crimes, A.R.S. § 13-604(K) required a prior conviction used for enhancement to be either admitted by the defendant or "found by the trier of fact." 1987 Ariz. Sess. Laws, ch. 307, § 3. By the time of Bay's trial in 2006, however, the jury trial provision had been eliminated and replaced by § 13-604(P), which provides only for a bench trial. Bay contends the statutory right to a jury trial on a prior conviction allegation under former § 13-604(K) was a substantive rather than procedural right, so the 1987 statute should have been applied. To hold otherwise, he argues, would require applying the current statute to him retroactively in violation of both his right to due process and the prohibition against ex post facto laws.

¶4 The only authority Bay cites in support of his contention, *United States Fidelity & Guaranty Co. v. State,* 65 Ariz. 212, 177 P.2d 823 (1947), is inapposite. It was a civil appeal in which a surety company challenged the trial court's order summarily forfeiting a bail bond after a criminal defendant had failed to appear for trial. The surety claimed the trial court's action, and the rule that authorized it, infringed on the company's constitutional and statutory right to a jury trial. The supreme court's now-sixty-year-old observation in that civil context that "the right to a trial by jury is a most substantial right" neither addressed nor resolved the specific issue presented here.

¶5 Other, more recent criminal cases have done so, however. As the Supreme Court stated in *Schriro v. Summerlin*, 542 U.S. 348, 353, 124 S. Ct. 2519, 2523 (2004), "rules that regulate only the *manner of determining* the defendant's culpability are procedural." Thus, the Court observed, "[r]ules that allocate decisionmaking authority"—specifying, for example, whether a judge may or a jury must "find the essential facts bearing on punishment"—"are prototypical procedural rules." *Id.; accord State v. Towery*, 204 Ariz. 386, ¶¶ 11-13, 64 P.3d 828, 833 (2003); *State v. Fell*, 209 Ariz. 77, ¶ 25, 97 P.3d 902, 909 (App. 2004). Consequently, the proper method for determining whether Bay had prior convictions was governed by the procedural statute in effect when he was tried in 2006 and still in effect, § 13-604(P), and not by the version of the statute in effect in 1987 when he committed his crimes.

¶6 Bay thus had no statutory right to have a jury in 2006 determine the existence of his prior convictions for sentence-enhancement purposes, and there is no constitutional right to a jury trial for that purpose. *See United States v. Booker*, 543 U. S. 220, 244, 125 S. Ct. 738, 756 (2005); *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536 (2004); *United States v. Cotton*, 535 U.S. 625, 627, 122 S. Ct. 1781, 1783 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000); *State v. Martinez*, 210 Ariz. 578, ¶ 26, 115 P.3d 618, 625 (2005). Because the previous version of § 13-604 created no substantive right to a jury trial on the prior convictions allegation, the

subsequent procedural change that transferred decision-making authority from a jury to the trial court did not deprive Bay of due process of law nor constitute an ex post facto law.

¶7 Although Bay thus had no right to a jury determination of the prior convictions allegation, even if he had had such a right, he knowingly and voluntarily waived a jury and agreed the trial court could review the evidence and make the necessary findings concerning the existence of prior convictions. We find illogical and unpersuasive his claim that he waived a jury on aggravating circumstances only and not for enhancement allegations. First, there has never been a right—before or since *Apprendi* and *Blakely*—to a jury trial on the existence of prior convictions as aggravating circumstances, *see* former A.R.S. § 13-702(C), 1987 Ariz. Sess. Laws, ch. 121, § 1, and prior convictions are expressly exempt from the jury trial requirement of *Apprendi* and *Blakely*. Thus, enhancement—not aggravation—was the only purpose for which Bay might even arguably have been entitled to a jury trial under former § 13-604(K).

¶8 Second, once the fact of a prior conviction is established by the requisite quantum of proof, the conviction's legal significance and its possible use for aggravation or enhancement are legislatively determined. If the reason Bay wanted a jury to find he had prior convictions for enhancement purposes was the state's presumptively higher standard of proof—that is, beyond a reasonable doubt rather than by clear and convincing evidence—any theoretical concern was mooted, and any possible prejudice averted, by the trial court's having found the state had proved beyond a reasonable doubt that Bay had three

prior convictions. *See State v. Cons*, 208 Ariz. 409, 94 P.3d 609 (App. 2004) (prior convictions for sentence enhancement purposes provable by clear and convincing evidence).

¶9 In short, we find no merit to Bay's argument that his voluntary waiver of a jury trial encompassed only the use of his prior convictions for aggravation but not for enhancement. Although the court's colloquy with Bay concerning his waiver could have been considerably more careful and specific, nothing in the record suggests Bay intended to limit, or believed he was limiting, the court to finding that he had prior convictions solely for purposes of aggravation while expecting a jury would separately determine the existence of the same convictions if used for enhancement. We find no error, much less fundamental error, in the trial court's having accepted Bay's jury trial waiver and then having found the facts of his prior convictions for all lawful purposes.

¶10 Although we reject Bay's claim that he was entitled to a jury trial on the allegation of historical prior felony convictions, we must nonetheless remand the case to the trial court for resentencing because two of Bay's sentences are illegal as imposed. After holding a separate trial on the prior convictions allegation immediately before sentencing and finding Bay had three convictions beyond a reasonable doubt, the trial court nonetheless failed to state that it was enhancing Bay's sentences on any of the four counts based on one or more historical prior felony convictions. The sentencing minute entry accurately reflects the court's oral pronouncement of sentence, reported in the transcript of the sentencing hearing as follows:

> With regard to Count 1, sexual assault, the Court finds that the aggravating factors outweigh the mitigating factors. You are sentenced to an aggravated term of 21 years in the Department of Corrections.
>
> With regard to Count 2, sexual assault, the Court finds the aggravating factors outweigh the mitigating factors. You are sentenced to an aggravated term of 21 years in the Department of Corrections. Count 2 will be consecutive to Count 1.
>
> Count 3, aggravated—kidnapping, a dangerous, nonrepetitive offense. You are sentenced to the aggravated term, the Court finding the aggravating factors outweigh the mitigating factors, of 21 years in the Department of Corrections.
>
> Count 4, with regard to the aggravated assault, a dangerous, nonrepetitive offense, the Court finds the aggravating factors outweigh the mitigating factors, and you are sentenced to a term of 15 years in the Department of Corrections.
>
> Counts 3 and 4 will be concurrent with Counts 1 and 2.

Thus, while Bay's sentences on counts three and four were enhanced based on the jury's finding that the offenses were dangerous, the trial court declared none of the four offenses repetitive and imposed only unenhanced, aggravated sentences on the two sexual assault convictions.

¶11 Under the provisions of A.R.S. §§ 13-701(C)(1) and 13-702(B) in effect in September 1987, when Bay committed the offenses, *see* A.R.S. § 1-246, the maximum possible aggravated sentence for a nonrepetitive, class two felony was fourteen years. *See* 1977 Ariz. Sess. Laws, ch. 142, § 57, renumbered by 1978 Ariz. Sess. Laws, ch. 201, §§ 104, 105; 1987 Ariz. Sess. Laws, ch. 121, § 1. Twenty-one years was the maximum

sentence available in 1987 for a class two felony committed with one prior felony conviction. 1977 Ariz. Sess. Laws, ch. 142, § 57; 1987 Ariz. Sess. Laws, ch. 307, § 3. For the same felony committed with two or more prior felony convictions, the sentencing range was between fourteen and twenty-eight years. 1977 Ariz. Sess. Laws, ch. 142, § 57; 1987 Ariz. Sess. Laws, ch. 307, § 3. Although the trial court's comments elsewhere in the record suggest it found only one of Bay's previous convictions qualified as a prior felony conviction for enhancement purposes, the court made no specific finding to that effect and thus created ambiguity in the record.

¶12 In short, the twenty-one-year, aggravated sentences imposed for Bay's sexual assault convictions exceeded the maximum aggravated term authorized by statute in 1987 for a nonrepetitive, class two felony. If the trial court intended to impose an enhanced, aggravated sentence, it failed to do so by either citing § 13-604 or declaring the offenses to be repetitive. As a result, we must remand the case to the trial court for resentencing on counts one and two in accordance with the applicable statutory provisions in effect on September 14, 1987. Bay's convictions and his sentences on counts three and four are affirmed.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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GARYE L. VÁSQUEZ, Judge

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J. WILLIAM BRAMMER, JR., Judge